PUBLIC VERSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
WORLDCALL INTERCONNECT, INC.	)	File No. EB-14-MD-011
a/k/a EVOLVE BROADBAND,	)	
Complainant	)	
	)	
v.	)	
	)	Proceeding No. 14-221
AT&T MOBILITY LLC	)	
Defendant	)	

WORLDCALL INTERCONNECT, INC. INITIAL MERITS BRIEF

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PUBLIC VERSION

TABLE OF CONTENTS

NOW COMES WORLDCALL INTERCONNECT, INC. ("WCX") and submits its Initial Merits Brief consistent with the scheduling order in this proceeding.[1] Page limits preclude a full discussion of all the evidence and every point made by the declarants. WCX trusts that Staff has also reviewed all the evidence, including in particular all of the parties' declarations, and will discern the parties' positions from those as well on any topic not specifically mentioned herein.

I. Background and recommended process of decision.

The Staff and parties developed a good evidentiary record, and although there is much difference of opinion the basic facts are largely uncontested. Discovery was conducted without much controversy.[2] Each side honed its terms to eliminate unimportant issues. Staff will have relatively few crisply-defined substantive issues to resolve, and then the issue resolution must be translated into specific contract terms using the now mostly agreed-to contract template.

Although the roaming complaint rules do not expressly call for issue-by-issue final offer arbitration similar to Rule 51.807(d)(1) that general approach would be well-suited for this case. Staff can decide an issue and then adopt the contractual provisions related to that issue presented by the party that prevails on that issue, subject of course to the basic overriding mandate that the agreement must comport with the Act and the Commission's rules and policies. As is allowed by the arbitration rules (51.807(*l*)(3)), the Staff can also determine that another result would better implement the rules and require different terms.

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[1] The Supplemental Declaration of Dr. Roetter is an attachment to this brief as per Staff's instructions.

[2] Only one discovery related issue remains. AT&T has supplied a few contracts to Staff for *in camera* review and they have not yet been produced to WCX. Given that the evidentiary record will effectively close with Dr. Roetter's Supplemental Declaration, absent some development in the briefing phase, WCX's request for access to those few agreements can be **abated**. WCX can abide with Staff alone having access to them. If things change during briefing WCX will advise Staff that it renews its request for WCX access.

II. Introduction to the issues.

A. Standard for review of the parties' proposals, and burden of proof.

This is not just a "data roaming" case under rule 20.12(e). WCX is also seeking and has a right to "automatic roaming" under Rule 20.12(a)(2) and (d) because interconnected voice and data services are involved. AT&T disputes that the automatic roaming rule applies, and insists that only 20.12(e) governs. This legal issue determines which legal standard applies to each party's proposal and which party has the ultimate burden on each issue.

B. Substantive issues.

AT&T and WCX have clear differences over a few but vitally important overarching legal and policy issues. There is also one contractual issue concerning enforcement. This case will be precedential and vital for both parties and the entire wireless industry. Fortunately the issues are well-developed and all of them can be decided based on the controlling precedent. Equally important, while the parties disagree over the conclusions that should be drawn, there are no significant disputes over basic facts. The task for Staff is to decide how to best implement the Commission's previously-expressed wireless policies and, in particular, three seminal roaming orders and the recent *WTB Declaratory Ruling*.[3] The applicable rules appear in Rules §20.12(a)(2), (d) and (e) and some of the definitions contained §20.3 as they existed prior to the *Open Internet Order*.[4] WCX will explain why its position best matches with the Commission's

[3] In calendar order the Commission "roaming" decisions are *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, R&O and FNPRM, 22 FCC Rcd. 15817 (2007) ("*Automatic Roaming Order*"); *In re Reexamination of Roaming Obligations of Providers*, Order on Recon and 2nd FNPRM, 25 FCC Rcd. 4181 (2010) ("*Automatic Roaming Reconsideration Order*"); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 2nd R&O, 26 FCC Rcd 5411 (2011) ("*Data Roaming Order*"); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Declaratory Ruling, 29 FCC Rcd 15483 (2014) ("*WTB Declaratory Ruling*").

[4] *Protecting and Promoting the Open Internet*, R&O on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015). The Commission changed several definitions relating to CMRS service. Wireless broadband Internet access is now a common carrier "interconnected service" and therefore a CMRS service. This case, however, will be

precedent based on the evidence and then tie back to the WCX Best and Final Offer ("BAFO") language that implements WCX's position.

III. The issues.

A. Standard for review of the parties' proposals and burden of proof; the automatic roaming rule applies.

1. The automatic roaming rule applies.

This is not just a "data roaming" case under Rule 20.12(e). WCX is also seeking and has a right to "automatic roaming" under 20.12(a)(2) and (d). AT&T wrongly insists that the case is solely about "data roaming" and only 20.12(e) governs. Staff's disposition of this legal issue will determine which legal standard applies to each party's proposal. If WCX is right AT&T has the burden of proving that its proposed terms are "reasonable and not unreasonably discriminatory" under §§201 and 202. Further, "[t]he Commission shall presume" that WCX's request "is reasonable" since there is no dispute that WCX is "a technologically compatible CMRS carrier." The presumption "may be rebutted." The Commission will resolve the matter "on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case."[5] On the other hand, if AT&T prevails on this issue WCX, as complainant, will have the burden of proving that AT&T's proposals are not "commercially reasonable," although once again the Commission will resolve the dispute "on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case."[6]

The legal question is which test–"just and reasonable" or "commercially reasonable"–applies and then which party AT&T or WCX bears the ultimate burden of proving that its proposed terms meet that standard. If the 20.12(d) automatic roaming rule applies, WCX's

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handled under the old rules because the Commission delayed implementation in the roaming context.

[5] *See* rule 20.12(d).

[6] *See* rule 20.12(e)(1) and (2).

proposed terms also enjoy a presumption of reasonableness. If only 20.12(e) applies, AT&T does not enjoy a presumption of reasonableness *as against WCX*. *WTB Declaratory Ruling* ¶¶24-26.

Rule 20.12(a)(2) imposes "automatic roaming" obligations on a carrier that "offer[s] real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls" or provides text-messaging service. AT&T has never denied it meets this test. Feldman Suppl. Dec. p. 12. WCX is "a technologically compatible facilities-based CMRS carrier." Feldman Dec. p. 2; Feldman Suppl Dec. pp. 8, 12. Roetter Dec. Table 1. AT&T is required to provide automatic roaming to WCX so that WCX's customers can use WCX's "interconnected" switched voice and data and "text-messaging" services while roaming on AT&T's network.

The automatic roaming rule supplies the standard and burden of proof associated with all terms and conditions other than those uniquely and solely pertaining to the specific circumstance of WCX customers that obtain only wireless broadband Internet access while roaming on AT&T's network. While that will occur on occasion, which means the commercial mobile data roaming requirement in 20.12(e) will also apply at times, it will likely be quite rare for a WCX customer to exclusively use only WCX's Internet access service while roaming and not also have a voice call or engage in texting. Every term, condition and price must be viewed through a Title II just and reasonable lens because each will ultimately come into play when a WCX user is receiving an interconnected voice or data service or text-messaging while roaming on AT&T's network.

AT&T's own terms implicitly acknowledge that automatic roaming is involved, but AT&T tries to limit it to only "GSM/UMTS/HSPA." AT&T's terms mention "voice" and

"SMS."[7] But AT&T has consistently claimed that "LTE" is "data"[8] only and 20.12(e) is the sole source of AT&T's roaming obligations. This argument, however, wholly ignores that AT&T presently provides "interconnected" voice, data and SMS on its LTE network. Feldman Suppl. Dec. p. 12 and Exhibit B. AT&T has automatic roaming obligations with regard to its LTE network, and WCX has the right to "automatic roaming" on AT&T's LTE network to support its LTE-based interconnected voice, data and SMS services.

VoLTE is an interconnected "voice" service. WCX also provides interconnected data services along with text-messaging. One of the primary WCX services in issue in this case is M2M. WCX's M2M services will be interconnected data service because they will have and use traditional telephone numbers and be able to initiate calls to and receive calls from the legacy public switched network. Feldman Dec. p. 2; Feldman Oct. 2, 2014 Suppl. Dec. p. 5; Roetter Dec. p. 4 and p. 52. Rule 20.12(d) applies.[9]

AT&T's proposed limits and restrictions, along with its price proposals, are all subject to the just and reasonable test, not the commercially reasonable test, insofar as any of WCX's interconnected voice, data or text-messaging services users require roaming on AT&T's 2G, 3G or LTE networks. The commercial reasonableness test comes into play **only** when a WCX user exclusively seeks and uses wireless broadband Internet access ("commercial mobile data service") while roaming. AT&T has the burden of proving its terms are just, reasonable and nondiscriminatory.[10]

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[7] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

[8] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

[9] *See Automatic Roaming Order*, 12 FCC Rcd at 15839, ¶60 ("the automatic roaming obligation applies to real-time, two-way switched voice or data services that are interconnected with the public switched network ....") (emphasis added)

[10] AT&T unreasonably discriminates against light and unlicensed wireless technologies. Roetter Suppl. Dec. p. 10.

2. AT&T does not enjoy a presumption of reasonableness based on its similar terms with other carriers.

a. No presumption of reasonableness for AT&T's proposals.

AT&T enjoys no presumption of reasonableness under the automatic roaming rules, but WCX does. Nor does the data roaming rule grant a presumption of commercial reasonableness to AT&T's proposed terms, since we are discussing an initial contract for roaming. *WTB Declaratory Ruling* ¶¶25-26.

b. AT&T's terms are not "arms-length" and reflective of a "market" result. WCX's other agreement is "arms-length" and reflective of a "market" result.

AT&T claims the Commission must impose AT&T's proposed terms on WCX because other carriers have accepted them. AT&T opposes WCX's mosaic of terms drawn from other agreements for large portions of its BAFO even though AT&T thinks its own amalgam is just fine. This is self-serving and internally inconsistent. When WCX proposes terms that deviate from or have no precedent in AT&T's existing agreements the proposals are characterized as somehow "outside the scope" of a roaming agreement. But when WCX does use provisions AT&T has previously accepted **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

According to AT&T the Commission cannot impose new or different terms and also cannot compel any previously-negotiated term or provision AT&T does not want a roaming complainant to have. Meadors Suppl. Dec. ¶5, note 13; Orszag Supp. Dec. ¶¶60-61. The complaint process, however, was created precisely because AT&T was unfairly imposing its will

[1] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

on requesting carriers.[12] The Commission surely did not intend to create a process that has no possible outcome other than the imposition of AT&T's unilateral desires. Roetter Suppl. Dec. pp. 9. That was the exact outcome the roaming complaint process was designed to prevent.

AT&T says its agreements are "market-based" and hence commercially reasonable. Orszag Suppl. Dec. Section IV. This oft-repeated claim lacks merit. AT&T is a resentful and reluctant roaming partner, but it has all the leverage. AT&T has much greater market and negotiating power and far greater resources compared to the overwhelming majority of operators with whom it has established roaming relationships. Vast asymmetries in power and information undergird the agreements between AT&T and the smaller operators. They are actually adhesion contracts because they are entirely imbalanced and were not entered under anything close to equal bargaining positions. The other contracts are not what would obtain when two willing but still self-interested business actors negotiate in good faith to reach fair, reasonable, balanced and compensatory roaming terms. Roetter Suppl. Decl. pp. 2. AT&T's terms are *suspect*, not presumptively reasonable.

There is now, however, an example of what a truly market-based roaming agreement would look like.[13] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[12] *Automatic Roaming Order* ¶¶28, 65-66; *Automatic Roaming Reconsideration Order* ¶¶26, 36-40; *Data Roaming Order* ¶¶24-27.

[13] WCX Suppl. Prod. (Bate 816-884).

[redacted] **[END HIGHLY CONFIDENTIAL]** AT&T's "arms-length" agreements are no such thing, but the **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** agreement is a truly "market-based" roaming agreement that completely meets the policies and goals behind the roaming rules. Roetter Supp. Dec. p. 20-21; Feldman Suppl. Dec. pp. 22-24.

WCX's terms, conditions and prices are more consistent with and better implement the Commission's "competing interests, including promoting competition among multiple carriers; ensuring that consumers have access to seamless coverage nationwide; and providing incentives for all carriers to invest and innovate by using available spectrum and constructing wireless

[14] *See Data Roaming Order* ¶21.
[15] WCX Suppl. Prod., §§1.34 and 11 (Bate 829 and 835).

network facilities on a widespread basis."[16] WCX users will be able to roam, but WCX must still build more networks. Roaming is a supplement to WCX primary service, but cannot be a substitute. Roetter Suppl. Decl. p. 21.

B. What is "Roaming"?

C. The Commission Should *Encourage* Not *Punish* Network Coverage Expansion, But Can Discourage Use of Roaming as the Primary Means of Service Delivery–in order to *Encourage* Network Coverage Expansion. (B. and C. discussed together)

AT&T and WCX fundamentally disagree over what is "roaming" and what is "resale." This necessarily requires that the contract itself have an express Commission-imposed definition.

Although the Commission has correctly held that an ability to obtain "too much" roaming will reduce incentives to invest in and deploy more facilities used to expand coverage, it has never held that "too much roaming" means the facilities-based CMRS provider has as a matter of law ceased its procurement of "roaming" and has begun to use "resale." The Commission has never adopted the concept that, at a certain quantity, "roaming" turns into "resale" because that is not possible. The Commission's *roaming* policy is based on multiple (and sometimes competing) policy objectives. One purpose is to support seamless nationwide connectivity through roaming, but there is a limit because the Commission also wants to ensure carriers have sufficient incentives to invest in additional infrastructure that will expand their own coverage areas, thereby reducing their need for *compelled* roaming.

1. Basic contract law requires a definition for "roaming"

All parties agree this is supposed to be a "roaming" agreement obtained under the "roaming" rules. The contract should–like most contracts for services–contain an express workable definition of the object to be obtained through and governed by the contract, *e.g.*,

[6] *Automatic Roaming Reconsideration Order* ¶2.

"roaming" that will allow "roamers" to "roam," so that all parties know what is allowed or required (because it is within the definition and scope of the service to be provided) and what is not contemplated (because it is not within the definition and scope of the service to be provided).

This is not some theoretical or abstract contention. Basic contract principles require that the object of a contract be sufficiently defined and described so the parties have a "meeting of the minds." The common law is fairly consistent among the states on this topic, so WCX will use Texas cases as a proxy for more general application. The requirements for a valid contract are: (1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds on all essential elements; (4) mutual consent; (5) consideration; and (6) execution and delivery of the contract with the intent that it be mutual and binding. "Meeting of the minds" describes the parties' mutual understanding of, and assent to, an agreement regarding a contract's essential terms. Thus, before either party can deemed to have consented to contractual terms ***both*** parties must have a common understanding about what the terms used in the contract actually mean. To be enforceable, a contract must be sufficiently definite in its material terms to establish the parties' intentions and understand what each promisor undertook.[17] This is not possible if the main object–roaming–is not ever given an express definition.

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[17] *Principal Life Ins. v. Revalen Development*, 358 S.W.3d 451, 454 (Tex. App.--Dallas 2012, *pet. denied*); *Coachmen Indus. v. Willis of Ill., Inc.*, 565 F. Supp. 2d 755, 766 (S.D. Tex. 2008); *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App.--Houston [1st Dist.] 2006, *pet. denied*); *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 555-56 (Tex. App.--Houston [14th Dist.] 2002, *no pet.*)); *2001 Trinity Fund, LLC v. Carrizo Oil & Gas, Inc.*, 393 S.W.3d 442, 449 (Tex. App. Houston [14th Dist.] 2012, *no pet.*); *Domingo v. Mitchell*, 257 S.W.3d 34, 39 (Tex. App.--Amarillo 2008, *no pet.*) ("Meeting of the minds" requirement is a subpart of the offer and acceptance elements rather than an independent element); *Paragon Indus. v. Stan Excavating*, 432 S.W.3d 542, 547 (Tex. App.--Texarkana 2014, *no pet.*); *Davis v. Chaparro*, 431 S.W.3d 717, 722 (Tex. App.--El Paso 2014, *pet. denied*); *Cleveland Constr., Inc. v. Levco Constr., Inc.*, 359 S.W.3d 843, 852 (Tex. App.--Houston [1st Dist.] 2012, *pet. dism'd*); *Expro Americas v. Sanguine Gas Exploration*, 351 S.W.3d 915, 920 (Tex. App.--Houston [14th Dist.] 2011, *pet. denied*); *Harris v. Balderas*, 27 S.W.3d 71, 77 (Tex. App.—San Antonio 2000, *pet. denied*); *Inimitable Group, L.P. v. Westwood Group Dev. II, Ltd.*, 264 S.W.3d 892, 899 (Tex. App. Fort Worth 2008); *Fort Worth ISD v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 220-221 (Tex. 1992)); *Bendalin v. Delgado*, 406 S.W.2d 897, 899 (Tex. 1966); *University Nat'l Bank v. Ernst & Whinney*, 773 S.W.2d 707, 710 (Tex. App.-- San Antonio 1989, *no writ*); *Gerdes v. Mustang Exploration Co.*, 666 S.W.2d 640, 644 (Tex. App.--Corpus Christi 1984, *no writ*).

This is especially the case here because the parties have fundamentally different concepts concerning what "roaming" is and is not. AT&T says WCX is really seeking "resale" rather than "roaming" because WCX allegedly wants "so much roaming" that WCX has crossed some unarticulated and arbitrary line. WCX, on the other hand, firmly contends that it wants only roaming and is not seeking "resale." The only way to resolve this dilemma is to contractually define what "roaming" "is."

AT&T's BAFO refers to "roaming" 89 times, "roamer" is used 77 times and "roam" appears 7 times. "Back-door resale" appears more than 52 times in AT&T's Public Answering submission, and more in the Confidential version. "Piggy-backing" and "de facto resale" also warrant citation as "*passim*" in the filing. Yet AT&T does not explain in the contract or its evidence how "too much roaming" transmutes into "resale" or point to the precise volumetric point at which the transmutation occurs. AT&T entirely avoids the definitional issue precisely so it can argue through *ipse dixit* that WCX is seeking "resale" rather than "roaming" and evade any rational justification for the numeric caps, limits and restrictions AT&T says are necessary to prevent WCX from wandering over the "line." At what point does WCX quit being a legitimate facilities-based CMRS provider seeking reasonable levels of "roaming" and become an undesirable AT&T "reseller"?[18] AT&T never gives a clue.

"Roaming" and "resale" do not occupy different spots on a single continuum no matter how many times AT&T insists they do. If they did "a little bit of resale" would be "roaming" and AT&T would have to provide service to small volume "resellers" under the "roaming" rule. That

[18] AT&T's approach is reminiscent of Justice Stewart on obscenity: "I shall not today attempt further to define the kinds of [activity] I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

is why the Commission has never held there is a point at which a facilities-based carrier's subscriber is no longer "roaming" but is instead using a "resold" service.

The Commission's rules do not have a formal rule-based definition of either "roaming" or "resale."[19] The Commission, however, has always been able to clearly define "roaming" and has repeatedly "succeeded in intelligibly doing so" ever since CMRS resale and roaming obligations were promulgated:

> Roaming occurs when the subscriber of one CMRS provider enters the service area of another CMRS provider with whom the subscriber has no pre-existing service or financial relationship, and attempts to either continue an in-progress call, receive an incoming call, or place an out-going call.[20]

The Commission has also always had a clear and unchanging definition for "resale":

> Resale has been defined as an activity in which one entity subscribes to the communications services and facilities of another entity and then reoffers communications services to the public (with or without "adding value") for profit.[21]

The Commission assiduously adhered to these characterizations in each CMRS roaming/resale decision since 1995. Indeed, the "roaming" description above is an almost *verbatim* copy of the language used in the Commission's most recent orders on the topic.[22] Nor has the distinctly different definition of "resale" ever changed.

Roaming is distinct from resale from a technical and economic perspective. For GSM/UMTS/LTE the difference starts with the SIM. Facilities-based network service provider

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[19] Rule 22.99 does define "roamer": "[a] mobile station receiving service from a station or system in the Public Mobile Services other than one to which it is a subscriber." The parties have agreed on a definition of "roamer" that is sufficiently consistent with the 22.99 definition: **[BEGIN CONFIDENTIAL]** [redacted] **END CONFIDENTIAL]**

[20] *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 2nd NPRM, 10 FCC Rcd 10666, 10670, ¶6, n. 10 (1995).

[21] Id. at 10694-10695, ¶60 (*citing Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261, 263 (1976) (*Resale and Shared Use Decision*), recon., 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir.), *cert. den.*, 439 U.S. 875 (1978). *See also Automatic Roaming Reconsideration Order* ¶35.

[22] See *WTB Declaratory Ruling* ¶2; *Data Roaming Order* ¶1; *Automatic Roaming Reconsideration Order* ¶2, n. 1; *Automatic Roaming Order* ¶5.

customers receive a SIM card from that provider and can then roam on compatible networks after authentication. Resold service customers use a SIM card that identifies the underlying carrier as the network service provider. Resellers buy capacity at wholesale and then resell at retail. The underlying carrier provides switching and connectivity to other networks and the public Internet. Roaming host carriage is different. The host carrier provides authentication and transmission to the roamer's network service provider, which does the rest (switching, PSTN interconnection or access to the Internet). Roetter Supp. Dec. p. 19; Feldman Decl. ¶¶18-19.

AT&T's "roaming" and "resale" *ipse dixits* (and usages without definitions) have no legal or technical basis. But since the parties obviously have incongruent understandings of what "roaming" is the contract must have a definition in order to obtain a meeting of the minds and avoid future disputes. WCX's proffered definition for "roaming"[23] is both necessary and fully consistent with the Commission's past usage. Indeed, it is very close to and was largely drawn from the definition used in *WTB Declaratory Ruling* ¶2. WCX's definition should be included.

2. WCX's proposed caps and volumetric limits strike the right balance.

WCX embraces the Commission's policy finding that "too much" *compelled* roaming can reduce a facilities-based CMRS provider's incentive to expand its coverage through additional facilities or other contractual means. A "roamer" that does not ever receive or only intermittently receives service using the network provider's own facilities-based coverage is still a "roamer." At some point, however, (and the dividing line is admittedly subjective) that user becomes a "permanent roamer." CMRS providers should not use compulsory roaming access to serve users that are not likely in position to receive "primary" service from the CMRS carrier's own network

[23] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

coverage, and basically obtain large scale "permanent roaming." That is not "resale" but it is "too much roaming." It is reasonable for there to be a cap or overall limit on the amount of compelled "roaming" to ensure carriers have the incentive to invest in and expand their own network coverage.[24] This is particularly so with "permanent roamers" not primarily served by a carrier's own facilities-based coverage.

The real dispute in this case is not truly about "resale"; the disagreement ultimately reduces to a dispute over the point at which a CMRS provider will secure "too much roaming" and will not have the incentive to build or obtain more of its own network because it can have large numbers of compelled "permanent roamers" who do not receive their primary connectivity from the CMRS provider's own coverage facilities. This is a subjective issue, and there are conflicting imperatives. On the one hand you want to incent facilities investment as much as possible, but on the other hand you have to recognize that very few providers will be able to entirely cover huge swaths of the country with their own facilities and rural users will routinely travel out of the coverage area for long periods. Further, everyone agrees that a certain amount of "incidental" permanent roaming is unavoidable. A balance must be struck. In this case the question is which party's terms best approximate the most appropriate balance. WCX's terms best meet the Commission's balancing of interests.

Although there are wording differences, AT&T and WCX have agreed in principle to define a "permanent roamer" as a user that receives **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** WCX initially

[24] This balance also implicates the rate, as explained below.

proposed a 50% cap, but in an effort to show good faith and reach a compromise WCX has now reduced its offer to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

Staff should pick one of the parties' numbers or select something in between. The *Automatic Roaming Reconsideration Order*, *Data Roaming Order* and *WTB Declaratory Ruling* provide the necessary consideration factors and so all that remains is for Staff to consider the particular circumstances at hand as detailed in the evidence, and then accomplish its delegated task of striking the right balance.[26] The specific consideration factors set out in *Automatic Roaming Reconsideration Order* ¶39 and *Data Roaming Order* ¶86 and then *WTB Declaratory Ruling* ¶¶28-29, to the extent they apply, guide this case after application of the evidence.[27]

[BEGIN HIGHLY CONFIDENTIAL] [redacted] **[END HIGHLY CONFIDENTIAL]** **[BEGIN CONFIDENTIAL]** [redacted]

[25] WCX does not agree that more than **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** The actual number is obviously far higher than that. WCX's proffer is made purely for compromise purposes and represents WCX's effort to meet the Commission's legitimate desire to not have compelled roaming be so easily available that there is a reduced incentive to construct new network. WCX's commitment to network deployment is certainly no longer in question, and that is an important fact to be considered when the balance is being struck.

[26] *Automatic Roaming Reconsideration Order* ¶¶18, 31.

[27] Not all of the factors apply to this case. For example *Data Roaming Order* ¶86 factors 1, 10, 11 and 17 and *Automatic Roaming Reconsideration Order* ¶39 factors 9 or 10 are not implicated.

[28] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[redacted] **[END CONFIDENTIAL]** or some number that falls between them, represents the level that will best achieve the Commission's multiple and sometimes conflicting goals and imperatives. The "no build" concern simply does not apply here. Indeed, WCX will be building so much network that AT&T feels threatened to the point that it purposefully inserted contractual provisions that inhibit and even prohibit WCX from investing in building and buying network facilities outside its licensed CMA.

[BEGIN CONFIDENTIAL] [redacted] **[END CONFIDENTIAL]** WCX was trying to compromise and provide further assurances that WCX would not go out and market service in areas where it had no coverage, or base its business plan on service to customers that reside in a place where WCX does not have coverage for primary service. It is now plain that WCX seeks compelled roaming to *supplement* WCX coverage, and is not looking for an **alternative** to WCX coverage.

WCX's terms make permanent roaming limited, incidental and transitory. WCX will for the most part always provide the primary portion of service **[BEGIN CONFIDENTIAL]** [redacted]

[END CONFIDENTIAL] [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL].

WCX's proposals, including WCX's suggested caps, best achieve the Commission's balancing criteria and consideration factors, especially given that WCX is relatively small and has limited capital resources that preclude any ability to buy extensive amounts of costly and scarce fully-licensed spectrum. WCX has met the build-out requirements for its fully-licensed 700 MHz license in CMA 667. Feldman Dec. p. 5; Roetter Dec. Table 1. In order to offer facilities-based service in other areas WCX will necessarily have to find alternatives, like Citizens' Band, Wi-Fi, leasing or contracted access, but it is clear WCX will build network and AT&T is now frantically trying to stop that from happening.[30] Alternative network based coverage is still coverage expansion and it will represent the broadband network deployment the

[29] [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

[30] AT&T's terms limit WCX's incentives and abilities to build network through definitions that restrict "network" to only certain specific technologies (GSM/UMTS/LTE). This violates the Commission's longstanding policy and principle of technological neutrality that even AT&T has heavily supported in the past. Roetter Suppl. Dec. p. 9. The definitional result operates to exclude mobile wireless services through Citizens' Band despite the Commission's recent actions to make that spectrum available for mobile wireless services. See notes 32 and 37 *infra*.

Commission has said it wants to see.[31] This alternative network capacity will reduce WCX's need for compelled roaming from AT&T. WCX is clearly committed to deploying and expanding its network and coverage, thereby reducing its need for AT&T-provided compelled roaming so WCX is obviously not trying to obtain "back-door resale" in either the short or long term. Nonetheless, WCX must be able to offer roaming to all of its customers so they can use WCX's service when they cannot connect to WCX's own coverage capabilities. WCX's BAFO strikes exactly the right balance for achieving the Commission's policy objectives.

D. WCX can have a Service Area, Services and Network beyond its 700 MHz "licensed" area.

AT&T's response to WCX's alternative network build-out efforts and commitment is perplexing and surprising. AT&T at first said that WCX should "build or buy" in order to limit its reliance on AT&T. Orszag Dec. ¶¶20, 20, 23, 42-43, 45-47; Prise Dec. ¶¶2-19. But for some reason AT&T is not pleased that WCX actually did so, and now rejects the idea. AT&T's BAFO terms deny roaming to WCX customers that reside anywhere other than WCX's fully-licensed 700 MHz CMA.[32] AT&T criticizes WCX's desire to market facilities-based service to users residing outside of WCX's fully-licensed home area because it will allegedly introduce unique and by implication undesirable economic implications. Orszag Suppl. Dec. ¶60. Facilities-based

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[31] WCX will be subject to the Commission's *Open Internet* rules even over these alternative technologies. AT&T may not like those rules but WCX embraces and supports them. AT&T may believe those rules reduce incentives to invest and deploy broadband, but WCX does not and wants to have a chance to prove the Commission is right. A refusal to support roaming for WCX customers that receive primary service from alternative technologies, however, will directly frustrate WCX's ability to expand its broadband offerings to other markets, for all the reasons set out by the Commission in the *Data Roaming Order*.

[32] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** The AT&T BAFO therefore prohibits roaming for WCX's customers that do not receive primary service in WCX's CMA and use alternative methods. Orszag admits that AT&T is trying to prohibit roaming for users of alternative methods. Orszag Suppl. Dec. pp. 6-7, 18-19 supports AT&T's BAFO terms that limit roaming to only users residing within WCX's fully-licensed CMA "home area."

competition through many platforms may be "unique" and undesirable to AT&T, but the Commission's main goal is to make it more common.

AT&T's contractual effort to bar WCX from having a facilities-based network anywhere other than within the confines of WCX's fully licensed CMA is an unreasonable contractual restraint of trade because it limits competition with AT&T. Roetter Suppl. Dec. p. 6. AT&T's position constitutes an unreasonable refusal to offer roaming for WCX customers that reside anywhere other than within the CMA, even though there is no technical or other rational reason for the refusal.[33] AT&T thinks light-licensed and unlicensed service based customers are inferior and do not deserve roaming. AT&T is way wrong.

AT&T has also very much changed its tune about WCX fulfilling its coverage needs by using third party networks, including roaming from other carriers. Orszag Decl. ¶10 said that WCX could and should secure roaming from other carriers rather than AT&T. Prise Decl. ¶¶2-19 were entirely dedicated to showing WCX had alternatives it should pursue. Orszag Supp. Decl. ¶59, however, now punishes WCX for taking him up on his original suggestion to find and use alternatives. Roetter Suppl. Dec. pp. 6-7. But even worse, under AT&T's BAFO WCX *cannot use another roaming partner to reduce its roaming needs from AT&T*. AT&T's contract drafters created a result where WCX must secure **all** of its roaming needs of whatever kind only through AT&T and still stay within AT&T's limits.[34] AT&T rigidly limits the amount of roaming WCX can get from AT&T, but then prohibits WCX from finding and using alternatives, even less

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[33] *Data Roaming Order* ¶89, factors 2, 9, 13, 14, 15, 16.

[34] **[BEGIN CONFIDENTIAL]** [redacted] **END CONFIDENTIAL**] If you can't be a "roamer" under AT&T's contract then you obviously cannot roam under AT&T's terms. WCX cannot use roaming from other carriers if WCX wants any roaming from AT&T.

costly ones. This is so even if the other carrier wants to sell roaming on more liberal and less-costly terms. Roetter Suppl. Dec. pp. 6-7, 14.

AT&T's purposeful refusal to offer and allow authorized roamer status to users that reside in places where WCX deploys alternative network coverage or obtains connectivity through contracted third party access directly conflicts with the Commission's expressed policy preferences in a number of proceedings and would frustrate several of the Commission's most important initiatives. The Commission recently found (again) that "small businesses and rural service providers have faced significant challenges to entering the [wireless] market and competing against larger carriers."[35] The Commission acted to ameliorate some of the high barriers facing small entities with limited spectrum holdings that want more coverage so they can better compete in the national wireless market using their own facilities employing fully-licensed spectrum.[36] But the Commission still understands that even with things like bidding credits and reserves small entities, including CMRS providers, cannot feasibly obtain the capital necessary for a nationwide footprint using only scarce and still-expensive fully licensed spectrum. Besides, there will never be enough fully-licensed spectrum to meet all needs even after the Commission's recent efforts. That is why the Commission has taken other action to open up "light licensed" and even unlicensed spectrum so small entities can expand their networks and provide more, better and faster broadband service and interconnected voice and data services.[37]

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[35] *In the Matter of Updating Part 1 Competitive Bidding Rules, et al*, R&O, Order on Recon., 3rd Order on Recon. and 3rd R&O, FCC 15-80, __ FCC Rcd ____, ¶2 (rel. Jul. 21, 2015).

[36] *FCC Reaffirms Decision to Reserve Spectrum to Promote Competition in 2016 Incentive Auction*, News Release, Dkt No 12-269 (rel. Aug. 6, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-334762A1.pdf (and associated individual statements).

[37] *In the Matter of Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, R&O and 2nd FNPRM, 30 FCC Rcd 3959, 4014, ¶¶1, 170-173 (rel. Apr. 21, 2015) (expressly allowing Citizens' Band spectrum to be used to provide mobile wireless services).

Although the standard of review may differ the actual policies and goals are the same for both automatic roaming for interconnected service and data roaming for commercial mobile data service.[38] The Commission wants a level playing field and all kinds of spectrum inputs (fully licensed, light-licensed and unlicensed) available so that the nationwide wireless market can be more competitive, have many facilities-based providers both large and small, and there can be more broadband, more service, more innovation, more consumer options and lower prices. To ensure this can happen, the Commission has also made sure that facilities-based providers with their own spectrum inputs can still **supplement** their coverage through roaming because users will not buy a small provider's service if it does not include seamless nationwide connectivity at no extra cost. Roetter Dec. p. 6; Roetter Suppl. Dec. p. 17.

AT&T is correct that "too much roaming" can reduce investment incentives, but forgets that "too little roaming" does too.[39] The "right amount" of roaming is necessary so smaller providers can offer an attractive service, garner customers and earn revenue that will recover operating costs and invested capital. Indeed, if roaming is not reasonably available small companies will not be able to attract capital to build any networks at all.

AT&T's terms would impose insurmountable disincentives for WCX to deploy and use broadband networks because WCX would not be able to offer roaming to customers that use WCX network capabilities other than fully-licensed spectrum, or reside outside of WCX's fully-licensed CMA. If WCX cannot offer roaming to customers that receive their primary service from these alternative network technologies WCX will not have a viable product and will not make the investment to deploy outside of its CMA. WCX obviously also needs reasonable

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[38] *Automatic Roaming Reconsideration Order* ¶50; *Data Roaming Order* ¶9.

[39] *See Data Roaming Order*, especially *inter alia* ¶¶1, 9, 13, 14, 15, 17, 20, 30, 31, 34; *Automatic Roaming Reconsideration Order inter alia* ¶¶1, 2, 3, 10, 18, 31, 35, 50.

roaming terms, conditions and prices so it can support the roaming needs of its CMA based customers as well.

E. Rates and the Term.

The common definition of "market power" is the ability to set prices above marginal cost without attracting entry."[40] That is because where there is "pure competition" the market price is precisely marginal cost if one assumes each firm is producing at its profit-maximizing level.[41] AT&T contends its prices are "market-based" but that is not true. A "market" price can be said to exist only when there is sufficient supply from multiple sources to the point that costs constantly move closer toward cost through operation of the "invisible hand" of competition. But there are only two roaming suppliers that can provide close to fully nationwide roaming: AT&T and Verizon, both of which are doing everything they can to ***restrict*** roaming supply and there are no indications any further entry will occur. AT&T's current "price" is a reflection of its market power, not what would obtain in a fully competitive market.

AT&T's price is extortionate and entirely without cost justification. Roetter Suppl. Dec. pp. 14-15, 19. AT&T's roaming price is higher than retail prices, and exceeds resale prices by even greater amounts. Retail and resale are unregulated and more competitive than roaming, whereas roaming is regulated as a substitute for competition. However, although roaming is in theory compelled, the high prices compared to the underlying cost demonstrate that regulation has to date not worked as a substitute for competition. *Id.* p. 19. This is likely so because there have not been any fully-litigated roaming cases and the Commission has not ever exercised its judgment and power to ensure the prices are reasonable through the adversary system.

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[40] *15th Mobile Wireless Competition Report*, 26 FCC Rcd 9964, 9713, ¶55 (2011).

[41] Hal R. Varian, Intermediate Microeconomics: A Modern Approach, W. W. Norton and Company, 1999, at 399. The Commission has relied on this text in the past in the context of mobile service. *See 16th Mobile Wireless Competition Report*, 28 FCC Rcd 3700, notes 221, 222, 240 (2013).

WCX is not suggesting that the Commission should set the price at cost. Price, like usage restrictions, involves a balancing of competing interests. There is a legitimate concern that an operator may use roaming as an alternative to investment in its own facilities if the price is low enough in comparison to the total costs (capital and operating expenses) of deploying and operating facilities. In order to mitigate this risk the *margin over cost* for roaming can be higher than that for unregulated retail or resale services in order to find the "right" amount above cost so as to encourage seamless national connectivity for all customers of all operators while not discouraging investment. Roetter Suppl. Dec. pp. 19-20.

We do not know AT&T's costs because AT&T did not provide them. One can imagine that is because a cost presentation would reveal supranormal profits under AT&T's prices. But AT&T specific costs are not necessary unless AT&T wants to show its costs are higher than other providers' costs. Dr. Roetter provided credible industry studies showing the probable cost of providing "data" service over wireless networks. The present cost is significantly below WCX's proposed prices and will continue to sharply decrease in the near future. WCX's proposal is comparable to retail prices and provides a significant margin, more than AT&T receives from either retail or resale. Roetter Suppl. Dec. pp. 16, 22, 24, Appendix A, Exhs. 24-25.

The "right" price should: (i) allow AT&T to cover cost and provide a reasonable margin and (ii) not make it impossible for WCX to compete at the retail level no matter how efficient or innovative it is in the operation of its own facilities and services. A price that exceeds retail market prices violates condition (ii), while one that is comparable to or somewhat below retail satisfies both (i) and (ii). Roetter Suppl. Dec. pp. 20-21. It also will not be so low that WCX has insufficient incentives to build.

[BEGIN HIGHLY CONFIDENTIAL] [redacted] **[END HIGHLY CONFIDENTIAL]** In an effort to compromise WCX's BAFO proffered a higher price than its initial 1¢/MB, and uses a rate structure for non-M2M services that WCX reached through voluntary "market" negotiations with **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** WCX's rates are reasonable and commercially reasonable, and provide a reasonable margin over cost.

AT&T's prices are not just and reasonable. Nor are they commercially reasonable. They are designed to limit or prevent competition and actively deter alternative network deployment and investment that will create additional network coverage even though this will in turn mean less demand for roaming on AT&T's network. The AT&T price would be prohibitively expensive for WCX's seamless nationwide offering. Feldman Suppl. Decl. pp. 22, 26; Roetter Suppl. Decl. p. 16.

F. Breach/Cancellation/Damages

AT&T is hostile to roaming[44] so WCX is concerned AT&T may choose to not honor its duties. If AT&T believes it will incur greater economic loss by performing under the contract and opening the door to innovation and more competition it will have an incentive to frustrate

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[42] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **END HIGHLY CONFIDENTIAL]**

[43] WCX proposed a 3 year term to accommodate the three-year incremental price step-down.

[44] AT&T (and Verizon) have consistently opposed every Commission roaming rule, and lost every time. So it has turned its efforts toward frustration of the goals. The next step will be a breach or refusal to honor contractual duties.

full implementation and ultimately breach. **[BEGIN CONFIDENTIAL]** [redacted] **END CONFIDENTIAL]** *See* Feldman Suppl. Dec. pp. 15-21.

IV. Conclusion

This case is about how to best implement the Commission's competing imperatives. WCX has developed new, innovative and cutting-edge facilities-based products and services the public will appreciate but AT&T abhors and is trying to stop. WCX is dedicated to building and buying where it can, and only needs compelled roaming to *supplement* its own coverage. WCX is not seeking "back door resale." WCX's prices are "market-based" because they were obtained through negotiations between two willing parties who understood the Commission's goals and strove to meet them. WCX's proposed terms recognize and strike the right balance and will advance the public's interest.

AT&T's terms violate the Commission's goals and policies because they deny seamless connectivity, prevent facilities deployment, increase consumer prices, block competition and frustrate innovation. Nor are AT&T's prices "market-based." To the contrary. They reflect AT&T's overwhelming market power. AT&T's terms will harm consumers and the public interest.

AT&T hammers the policy while WCX nails the balancing. That is why WCX's position should be accepted and its terms adopted.

Respectfully Submitted,

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August 10, 2015

Certificate of Service

I hereby certify that on August 10, 2015, I caused a copy of the foregoing to be served on the following as indicated below:

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Appendix
Supplemental Declaration of Dr. Martyn Roetter